AB SALAM AB RAHMAN

v.

SOUTHERN BANK BHD

HIGH COURT MALAYA, KOTA BHARU
SURIYADI HALIM OMAR J
[ORIGINATING MOTION NO: MT(2) 25-17-2000]
21 MAY 2000

CIVIL PROCEDURE: *Appeal - Appeal from land administrator - Mode of appeal proper - No appeal records filed - Whether such appeal records necessary - National Land Code 1965, s. 418 - Rules of the High Court 1980, O. 5, 8*

LAND LAW: *Charge - Notice of demand - Failure to specify in notice amount due on date order was made - Whether such notice defective - National Land Code 1965, s. 263, Form 16H*

LAND LAW: *Charge - Notice of default - Failure to serve notice of default - Whether order of sale should have been granted - National Land Code 1965, Form 16D*

The appellant, owner of certain land ('the said land'), had charged the said land to the respondent in exchange for a loan. Sometime in June/July 1999 the appellant came to know that an application to auction the said land had been filed at the land office and was subsequently served with a summons to appear to hear the charges. On the date of the hearing which was fixed for 20 July 1999, the appellant objected to the proceedings on the ground that he was never served with any claims or demand letter in Form 16D. The objection was rejected.

Only subsequently did the appellant receive Form 16H dated 10 April 2000 from the land administrator, indicating that the land was to be auctioned on 21 May 2000 at the premises of the Land Office. The appellant now appeals under s. 418 of the National Land Code ('NLC') on the ground that the auction order should not have been granted.

The respondent however raised a preliminary objection in that although the mode of the appeal was proper, that is by way of an originating motion, no appeal records were filed.

Held:

[1] Section 418 of the NLC which provides for an appeal from the decision of the land administrator merely makes reference to the word 'civil procedure' without specifically stating the mode of the procedure to be adhered to. It is also silent as to the necessity of any accompanying documentation. It is also silent as to whether it ought to begin by originating motion, originating summons or the usual format of an appeal from the subordinate court.

[1a] Although O. 5 r. 1 of the Rules of the High Court 1980 ('RHC') reads that 'subject to the provisions of any written law and the rules therein, civil proceedings in the High Court may be begun by writ, originating summons, originating motion or petition', O. 5 r. 5 provides that an originating motion may be adverted to only if the rules or the relevant written law require or authorise it to be so begun. Moreover O. 8 of the RHC reads that such provision 'shall apply to all motions subject, in the case of originating motions of any particular class, to any special provisions relating to motions of that class made by these rules of by or under any written law.' It is not legislated under O. 8 of the need for an appeal record to be attached.

[1b] Therefore without s. 418 of the NLC requiring or authorising the appeal to be conducted by motion, the appeal therefore may be made in any form in which the court can be moved.

[2] The mandatory provisions in s. 263 of the NLC had not been complied with fully as Form 16H had not specified the amount due to the chargee at the date when the order was made which was 10 April 2000.

[2a] Furthermore the inquiry was held on 20 July 1999 while the order was made only in April 2000 resulting in a delay of 10 months.

[2b] Prior to the inquiry, the appellant was never served with the notice in Form 16D. Furthermore the objections raised by the appellant were not replied to by the respondent – thus the presumption was that the respondent acquiesced to all the allegations.

[Appeal allowed.]

Case(s) referred to:

Arrow Vista Sdn Bhd v. Jawatankuasa Kerja Tanah Wilayah Persekutuan [1999] 7 CLJ 309 ***(not foll)***

Dusun Semenyih Sdn Bhd v. Development & Commercial Bank Bhd [1988] 3 MLJ 156 ***(not foll)***

Nanyang Development (1966) Sdn Bhd v. How Swee Poh [1969] 1 MLJ 232 ***(foll)***

Pengarah Tanah dan Galian Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135 ***(refd)***

Re Sarjit Singh Khaira [1990] 3 MLJ 415 ***(refd)***

Shell Co of the Federation of Malaya Ltd v. Chairman, Municipal Council [1961] 27 MLJ 141 ***(refd)***

Legislation referred to:

National Land Code 1965, ss. 5, 261(1)(c), 263, 418
Rules of the High Court 1980, O. 5 rr. 1, 5, O. 8 r. 3(1), (2), O. 55(1)
Subordinate Courts Act 1948, ss. 77(1), 79(2)
Subordinate Courts Rules 1980, O. 1 r. 6(1), O. 49

For the plaintiff - Wan Jawahir; M/s Wan Jawahir & Co
For the respondent - Nor Zahari; M/s Mokhtar & Co

Reported by Mariette Peters-Goh

JUDGMENT

Suriyadi Halim Omar J:

The applicant who is the owner of Lots PT 445 and 446, GM 599 and 600 respectively, Mukim Enggong, Daerah Mengkebang, Jajahan Kuala Krai, Kelantan (hereinafter referred to as "the said land"), had charged them to the respondent in exchange for a loan. Sometime in June or July 1999 the applicant came to know that an application to auction the land had been filed at the land office, and was subsequently served with a summons to appear to hear the charges. That summons was pursuant to s. 261(1)(c) of the National Land Code 1965. The inquiry was fixed for 20 July 1999, and the applicant did attend it. At that date the applicant objected to the proceedings, on the ground that he was never served with any claims or demand letter in the form of Form 16D. The objections were rejected and the land administrator concerned proceeded with the hearing. At the end of the day, the latter ordered that unless the debt for which the said land charged were not paid up, an auction would ensue.

Subsequently the applicant received Form 16H dated 10 April 2000 from the land administrator, which indicated that the said land was to be auctioned on 21 May 2000 at the premises of the land office. Before me the respondent raised a preliminary objection, on the ground that even though

the mode of the application was proper ie, by way of an originating motion, as no appeal records were filed, the action was wanting. The counsel for the respondent ventilated that without the records the court would be groping in the dark, or to use his words, like wanting to enter a house that had no doors. He ventured to draw my attention to O. 55 of the Rules of the High Court 1980 where a copy of the appeal record was required by it. Having heard the objection I rejected it and accordingly proceeded to hear the substantive appeal. After an unnecessarily long session, I allowed it and ordered that the order of auction by the land administrator be set aside. I now supply my reasons as to why I rejected the preliminary objection; and subsequently obviated the auction order.

The matter before me was pursuant to a specific statute ie, the National Land Code 1965, and embedded within it, the pertinent provision dealing with matters of appeal. The relevant section is s. 418, and it reads:

(1) Any person or body aggrieved by any decision under this Act of ... the land administrator may, at any time within the period of three months beginning with the date on which it was communicated to him, appeal therefrom to the court.

(2) Any such appeal shall be made in accordance with the provisions of any written law for the time being in force relating to civil procedure; and the court shall make such order thereof as it considers just.

(3) In this section "decision" includes any act, omission, refusal, direction or order.

Perusing the above section it is crystal clear that no procedures were promulgated by Parliament for matters intended therein. It merely makes reference to the word 'civil procedure' without specifically stating the mode of the procedure to be adhered to. Indisputably it is also silent as to the necessity of any accompanying documentation. It is also silent as to whether it ought to be begun by originating motion, originating summons or the usual format of an appeal from the subordinate court. With s. 5 of the NLC interpreting "court" as "the High Court in Malaya", and the appeal to be in accordance with the provisions of any written law for the time being in force relating to civil procedure, the Rules of the High Court 1980 take centre stage. What provision then should the applicant adhere to?

Order 5 r. 1 of the RHC reads that subject to the provisions of any written law and the rules therein, civil proceedings in the High Court may be begun by writ originating summons, originating motion or petition. Without the necessity of supplying the reasons due to their obviousness, and by the

process of elimination, the mode of resorting to writs, originating summons and petition may safely be discounted for purposes of the current case. On the other hand, as regards proceedings begun by originating motion, O. 5 r. 5 provides that this mode may be adverted to only if the rules or the relevant written law require or authorise it to be so begun. Perusing s. 418 of the NLC, it is undeniable that that provision does not require or authorise an appellant to submit the appeal by the latter mode. Generally too the law is that if the type of process is not specified in the written law, the format to be resorted to will be by way of an originating summons (*Re Sarjit Singh Khaira* [1990] 3 MLJ 415). It is also trite law that proceedings begun by originating summons are those cases where the sole or principal question at issue or likely to be, is one of construction of any written law or instrument made by any written law, deed, will or contract. This mode may be resorted to in a situation where there is unlikely to be any substantial dispute of fact. In the current appeal, clearly there was substantial dispute of fact and law. With such a factual background, but without s. 418 requiring or authorising the appeal to be conducted by motion, I thus found it necessary to delve into the matter longer. In the course of my research I managed to locate a few cases that were relevant. I begin with the case of *Nanyang Development (1966) Sendirian Berhad v. How Swee Poh* [1969] 1 MLJ 232, for analogy purposes, where the applicant wanted to remove a caveat by way of originating motion. The respondent objected on the ground that as the NLC was silent as to the procedure to be adopted, then that motion was irregular and misconceived. Overruling the objection His Lordship Raja Azlan Shah J (as His Highness then was) stated:

> I agree with the proposition that in such a case as the present where the Act of Parliament does not expressly specify in what form an application may be made to the court, as a matter of procedure it may be made in any form in which the court can be moved.

A case in point is *Dusun Semenyih Sdn Bhd v. Development & Commercial Bank Bhd* [1988] 3 MLJ 156 where Siti Norma Yaakob J (as Her Ladyship then was), when addressing the format of the appeal in s. 418, stated that the proper mode was by way of an originating motion. The court went one step further by stating that there must be an appeal record in accompaniment Azmel b Maamor J in *Arrow Vista Sdn Bhd v. Jawatankuasa Kerja Tanah Wilayah Persekutuan* [1999] 7 CLJ 309 dealing with the s. 418 appeal similarly agreed with the originating motion format. In *Pengarah Tanah Dan Galian Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd.* [1979] 1 MLJ 135, the appeal was also begun by originating motion by the applicant. It was initially objected to at the High Court but rejected by the judge, a stance to be abandoned at

the Federal Court. Their Lordships which proceeded with the appeal, thus by implication endorsing the mode of action, commented:

> At the hearing a number of preliminary points regarding the procedure were raised and argued by the Senior Federal Counsel but the learned judge rejected them. We are no longer concerned with those points as they were, **quite properly**, abandoned in this Court (emphasis mine).

Due to the above authorities, it will be incomplete if O. 8 of the Rules of the High Court 1980, with all the rules is not discussed. This order reads:

> The provisions of this Order apply to all motions subject in the case of originating motions of any particular class, to any special provisions relating to motions of that class made by these rules or by under any written law.

As the current motion is not of a particular class, the notice thus will have to be in Form 9, as required by O. 8 r. 3(1). Under O. 8 r. 3(2) it is provided that the notice of motion, ie, that impugned Form 9, must include a concise statement of the nature of the claim made or the relief or remedy required. In this case, all the requirements, be it pursuant to O. 8 r. 3(2) or as printed in that form had been complied with. It is not legislated under O. 8 or stated in the statutory form of the need for an appeal record in the accepted sense to be attached. To attach to the originating motion a record of appeal, would be like enmeshing into O. 8 the legal requirements of O. 55 r. 1, a predicament which would raise a lot of eyebrows. The latter provision is entitled "Appeals from the Subordinate Courts and Statutory Bodies", and bespoke of receiving an appeal record pursuant to O. 49 of the Subordinate Courts Rules 1980. In this provision, clearly an appeal record emanating only from "the court appealed from" is required, with the other preconditions to be followed invariably. Perusing O. 1 r. 6(1) of the SCR 1980, "court" is defined as "means a Sessions Court or a president whether sitting in court or in chambers and includes, in cases where he is empowered to act, a magistrate". The land administrator falls under the magistrate's category either as an *ex-officio* first class magistrate or second class magistrate appointed by the State Authority, by virtue of ss. 77(1) or 79(2) of the Subordinate Courts Act 1948 respectively (Fourth Schedule of the Subordinate Courts Act 1948). The above brief legal scenario is a bit of a mouthful but it cannot be denied that there is so much dissimilarity between an appeal emanating from the land administrator and an appeal from the subordinate court, let alone the requirements of an originating motion. Under s. 418, time to appeal begins within three months after a decision has been communicated to the aggrieved party. Under O. 49 of the SCR 1980, read together with O. 55 of the RHC 1980, the notice of appeal has to be filed within 14 days from

the date the decision was pronounced. If the requirements of O. 8 have to be supplemented by the prerequisites of O. 55, then matters like the memorandum of appeal etc. will seriously have to be considered. Surely an impossible task will await all parties let alone the presiding judge, hence the remark that a lot of eyebrows will be raised. As I see it, if such a requirement is not legislated in O. 8 why the hurry to invent unnecessary problems?

If I may make an observation, the grounds or remedy sought, and those recorded on the relevant Form 9 could easily act as the record of appeal. The affidavit filed by the appellant would supplement the remedy sought (*Shell Co. of the Federation of Malaya Ltd. v. Chairman, Municipal Council* [1961] 27 MLJ 141). If the grounds supplied in that Form 9 or affidavit are too brief, then that is to the detriment of the appellant. The respondent should be the last person to complain. In the above case of *Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd.*, with the exception of the affidavit that was quite comprehensive, the originating motion there did not bare the grounds of appeal in the motion. Inspite of that the court failed to declare that any defect was detected in the action. In the current case, not only was the remedy sought adequately stated in the originating motion, but further amplified in the affidavit.

Moving on to the merits of the appeal, at the earliest permissible stage during the proceedings I did heavily hint my rejection of the suggestion that the appellant's interest had been prejudiced in the circumstances of the case. This is so as even if the appellant had not been served with the statutory form 16D, by being present not only could he adequately protect his interest, but was sufficiently protected by the land administrator. As much as I despaired at the flimsy excuses of the appellant, I detected a serious flaw in the auction order served on the appellant. For a better appreciation of the flaw I herewith reproduce the translated order in toto.

NATIONAL LAND CODE
FORM 16H
(Section 263)

ORDER OF SALE AT INSTANCE OF CHARGEE

I, MD SHANI BIN ISHAK Land Administrator, having made enquiry on the application of the Chargee under the charge described in the Schedule below of the land/undivided share in the land/lease/sub-lease so described, and being satisfied that no cause to the contrary exists:

Hereby, in exercise of the powers conferred by section 263 of the National Land Code, order the sale of the said land/undivided share in the land/ sublease:

And I further order:

a) that the sale shall be by public auction, to be held on Sunday the 21st day of May, 2000 at 10am at the Land Office District of Kuala Krai, Kelantan;

b) that the reserve price for the purpose of the sale shall be RM48,000.

I find that the amount due to the chargee as at the 5 March 2000 is RM244,601.22.

Dated this 10th day of April 2000.

sgd
(MD SHANI BIN ISHAK)
Land Administrator
District of Kuala Krai.

SCHEDULE OF LAND AND INTEREST

Town/Mukim	Lot No.	Description	Share of land	Reg. No.	Reg. No. of charge
Enggong	445	GM599	All	...	GD.505/84
	446	GM600			

To pinpoint the relevant legal defects that I detected in the above order, and to be discussed forthwith, italicizing has been liberally implemented by me on them. To fully comprehend my remarks I herewith reproduce s. 263 of the NLC for completeness. It reads:

263 Order for sale, and matters to be dealt with thereby

(1) At the conclusion of any enquiry under section 261, the Land Administrator shall order the sale of the land or lease to which the charge in question relates unless he is satisfied of the existence of cause to the contrary.

(2) Every such order shall be in Form 16H, and shall -

(a) provide for the sale to be by public auction;

(b) specify the date on which the sale is to be held, being a date not less than one month after the date on which the order is made;

(c) **specify the amount due to the chargee at the date on which the order is made;** and

(d) fix a reserve price ... (emphasis added).

It was bad enough that the impugned Form 16D was supposed to have been served on the appellant on 27 November 1988, with the inquiry letter sent on 13 June 1999; but to be exacerbated by a delayed and defective decision was unforgivable. It was indisputable that the inquiry date was 20 July 1999 yet the order was only pronounced on 10 April 2000, a delay of about ten months. What was beyond redemption was the fact that the mandatory provisions of s. 263 had not been complied with fully as that statutory Form 16H had not specified the amount due to the chargee, at the date when the order was made. The amount should be as at 10 April 2000 and not 5 March 2000, a date totally alien to the law. The final nail that sealed the coffin against the respondent was the fact that it never made any attempt to reply to the allegations of the appellant, thus deemed to have acquiesced to all the allegations. Based on all the above reasons I had no qualms in allowing the appeal with costs.